Whistleblower Newsletter Sarbanes-Oxley Cases

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U.S. Department of Labor
Office of Administrative Law Judges
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002
(202) 693-7500
www.oalj.dol.gov

John M. Vittone
Chief Judge

Thomas M. Burke
Associate Chief Judge
for
Black Lung and
Traditional

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DISMISSAL OF APPEAL; COMPLAINANT DECIDES TO PROCEED IN FEDERAL DISTRICT COURT AFTER FILING OF APPEAL WITH THE ARB

In ***Heaney v. GBS Properties LLC***, ARB No. 05-039, ALJ No. 2004-SOX-72 (ARB May 19, 2005), the ALJ had issued a recommended decision dismissing the complaint. Several months after filing an appeal with the ARB, the Complainant - acting pro se - wrote to the ARB stating that his attorney had filed an action in federal district court and that he requested to proceed de novo in that forum. The ARB dismissed the appeal, noting that the Sarbanes-Oxley whistleblower provision provides that if the Board has not issued a final decision within 180 days of the date on which the complainant filed the complaint and there is no showing that the complainant has acted in bad faith to delay the proceedings, the complainant may bring an action at law or equity for de novo review in the appropriate United States district court, which will have jurisdiction over the action without regard to the amount in controversy.

Similarly, in ***Allen v. Stewart Enterprises, Inc.***, ARB No. 05-059, ALJ Nos. 2004-SOX-60 to 62 (ARB Aug. 17, 2005), the Complainants filed their complaint on February 2, 2004. OSHA found that the complaint lacked merit, and the Complainants requested a hearing. On February 15, 2005 an ALJ issued a recommended decision finding against the Complainants. The Complainants filed a Petition for ARB review on March 22, 2005. On July 18, 2005, the Complainants informed the Board that they intended to purse their SOX case in federal court, and the Board dismissed the appeal pursuant to 18 U.S.C.A. § 1514A(b)(1)(B); 29 C.F.R. § 1980.114. The Board noted that, as usually is the case, the 180-day period for DOL to deciding the case had expired before the Complainants filed their petition with the Board.

RIGHT TO FILE IN FEDERAL COURT IF OSHA MAKES ITS DETERMINATION AFTER 180 DAYS HAVE PASSED; COMPLAINANT IS NOT REQUIRED TO EXHAUST REMEDIES BEFORE ALJ AND ARB

Where OSHA issued its determination after 180 days had passed since the filing of the complaint under the whistleblower provision of the SOX, and the Complainant filed for de novo review in federal district court rather than requesting a hearing before a DOL ALJ, the Complainant was not required to exhaust administrative remedies prior to filing the district court action**.** ***Hanna v. WCI Communities, Inc***., No. 04-80596-CIV. (S.D. Fla. Nov. 18, 2004). The court also rejected the Respondent's argument that the OSHA findings were entitled to res judicata effect.

REMOVAL TO FEDERAL COURT; PROOF OF FILING WITH THE SECRETARY OF LABOR; PRESUMPTION OF DELIVERY; BAD FAITH NOT SHOWN MERELY BY FAILURE TO FOLLOW PROCEDURE

In ***Murray v. TXU Corp.***, No. 3:03-CV-0888-P (N.D.Tx. Aug. 27, 2003) (unpublished), the Defendant challenged the District Court's jurisdiction over the Plaintiff's SOX suit on the ground that it was not clear that the Plaintiff had timely filed his complaint with the Secretary of Labor. The court rejected the challenge based on the "well-recognized presumption concerning receipt of properly addressed, paid-for, and mailed documents" which the Plaintiff raised by sworn affidavit of his counsel. Slip op. at 3 (citation omitted). The Defendant attempted to rebut by asserting that there was no evidence to establish that the person who signed a return receipt worked at DOL, but the court found that merely making this observation was insufficient to rebut the presumption. The Defendant also pointed out that the Secretary had not taken any actions to investigate the complaint; the court, however, held that this circumstance did not rebut the presumption of receipt. Finally, the Defendant argued that the Plaintiff caused or contributed to DOL not investigating the complaint within the 180 days because the Plaintiff had not filed with the OSHA Area Director as provided in the regulations and had not contacted the Secretary about the status of the complaint. The court, however, found that the Plaintiff's failure to follow procedure "and not holding the Secretary's feet to the irons" might have caused delay, but they did not by themselves indicate bad faith on the part of the Plaintiff.

REMOVAL TO DISTRICT COURT; LACK OF NOTICE OF SUIT

The ARB dismissed the appeal before it where the Complainant had begun a proceeding in U.S. District Court seeking a de novo hearing on his SOX claim. The Board observed that the record did not show that the Complainant ever notified the ALJ or the ARB of this suit until after the ARB issued a briefing schedule. ***McIntyre v. Merrill Lynch Pierce Fenner & Smith, Inc.***, ARB No. 04-055, 2003-SOX-23 (ARB July 27, 2005).

REMOVAL TO FEDERAL COURT; COMPLAINANT'S RENEGE ON REPRESENTATION THAT HE UNDERSTOOD THAT DELAYS CAUSED BY HIM WOULD TOLL THE 180 DAY PERIOD

In ***Nixon v. Stewart & Stevenson Services, Inc.***, 2005-SOX-1 (ALJ Feb. 16, 2005), the ALJ denied the Complainant's motion for a voluntary withdrawal of his complaint to pursue an action de novo in federal district court where the Complainant had obtained several delays in the hearing date over the objection of the Respondent and based on the concession by the Complainant that the delays would toll the 180 day clock. By the ALJ's reckoning, the tolled 180 day time period would not expire for several more months.

The ALJ concluded that because the withdrawal under these circumstances could result in a finding that the Complainant had not exhausted administrative remedies thereby depriving the district court of jurisdiction, he would deny the motion to withdraw, but would also consider the request as a motion for a stay pending filing with a district court.

The ALJ recognized that the ultimate determination of whether the 180 day period had elapsed and whether jurisdiction is properly in federal district court is for the federal district court, but that he was still obliged to address whether a stay was appropriate. The ALJ found that it was not because of the delays sought by the Complainant or caused by the Complainant's failure to comply with discovery obligations, and because it was bad faith to renege on his representation that he understood that the 180 day period would be tolled. The ALJ went on to consider, and grant the Respondent's motion for summary decision on the ground that the Complainant did not engage in protected activity.

PROCEDURE BEFORE FEDERAL DISTRICT COURT

JUDICIAL NOTICE; FEDERAL COURT CAN TAKE JUDICIAL NOTICE OF DOL ADMINISTRATIVE RECORD

A federal district court can take judicial notice of the DOL administrative record in a SOX whistleblower proceeding. ***McClendon v. Hewlett-Packard Co.***, 2004 WL 1421395 (D.Idaho June 9, 2005) (case below ALJ No. 2005-SOX-3).

JURY TRIAL; WHETHER A RIGHT TO A TRIAL BY JURY IS FOUND IN THE SOX WHISTLEBLOWER PROVISION

In ***McClendon v. Hewlett-Packard Co.***, 2004 WL 1421395 (D.Idaho June 9, 2005) (case below ALJ No. 2005-SOX-3), the Defendant moved to strike the Plaintiff's demand for a jury trial in regard to an ERISA employee protection claim. The Plaintiff had also filed a SOX employee protection claim, and the Defendant's motion was based on the assumption that the court had granted a motion to dismiss or summarily adjudicate the SOX claim. The court, however, had denied summary adjudication of the SOX claim, and therefore denied the motion to strike the demand for jury trial.

[Editor's note: implicit in this ruling is the assumption that a jury trial is available in a SOX claim; however, the court did not specifically address this question].

JURY TRIAL; WHETHER A RIGHT TO A TRIAL BY JURY IS FOUND IN THE SOX WHISTLEBLOWER PROVISION

In ***Murray v. TXU Corp.***, 2005-WL-1356444 (N.D.Tex. June 7, 2005), the district court struck the Plaintiff's motion for a jury trial on his SOX employee protection claim. The Defendant moved to strike the demand for a jury trial on the ground that the SOX only provides for equitable relief. The court rejected the Plaintiff's contention that the SOX's reference to an "action at law" implied a right to a jury trial. The court also rejected the Plaintiff's contention that he was entitled to a jury trial because he seeks legal claims of exemplary damages and reputational injury, the court finding that neither of those types of relief are available under the SOX whistleblower provision. Finally, the court also rejected the Plaintiff's contention that the legislative history supported a right to a jury trial. The court, however, stated that it would consider use of an advisory jury if requested by the parties.

TIMELINESS OF COMPLAINT

TIMELINESS OF COMPLAINT; ALTHOUGH THE PLAINTIFF'S COMPLAINT WAS UNTIMELY IN REGARD TO NOTICE OF HIS REMOVAL, THE COMPLAINT WAS TIMELY AS TO ADDITIONAL ACTIONS ALLEGEDLY CONSTITUTING ADVERSE EMPLOYMENT ACTION THAT OCCURRED ON OR AFTER THE DATE OF REMOVAL

In ***McClendon v. Hewlett-Packard Co.***, 2004 WL 1421395 (D.Idaho June 9, 2005) (case below ALJ No. 2005-SOX-3), the district court granted the Defendant's motion for summary judgment in regard to the lack of timeliness of the Plaintiff's administrative complaint under the SOX whistleblower provision insofar as the Plaintiff had not filed a complaint within 90 days of the date that he was informed that he would be removed as a project manager. The district court, however, found that under the 9th Circuit's expansive definition of what constitutes an adverse employment action, summary judgment could not be granted as to the timeliness of potentially separate and discrete adverse actions that occurred on or after the date the Complainant was actually removed as project manager: not being immediately reassigned another job; being left to sit in a conference room without an assignment; not being placed in a different job until several months later; and ultimate assignment to a job with a reduced pay range. The court made it clear that it was only ruling that the complaint was timely filed, and not associated issues such as whether these claims were actually included in the administrative complaint, whether they actually constituted adverse employment action, and whether the Plaintiff exhausted his administrative remedies.

TIMELINESS OF FILING OF COMPLAINT; LIMITATIONS PERIOD BEGINS TO RUN WHEN THE COMPLAINT IS MADE AWARE OF DECISION TO TERMINATE HIS EMPLOYMENT RATHER THAN WHEN DISCUSSIONS ABOUT SEVERENCE COMPENSATION ARE CONCLUDED

In ***Carter v. Champion Bus, Inc.***, 2005-SOX-23 (ALJ Mar. 17, 2004), the ALJ held that the limitations period for filing a SOX complaint began to run when the Complainant was made aware of the decision to terminate him and not when talks about severance compensation ended or when the consequences of the adverse employment action became most painful. Because the complaint was filed untimely and there were no mitigating circumstances, the ALJ dismissed the complaint.

TIMELINESS OF COMPLAINT; EVENT TENDING TO SHOW LINK BETWEEN PROTECTED ACTIVITY AND TERMINATION DID NOT EXTEND FILING PERIOD WHERE IT WAS NOT CREDIBLE TO BELIEVE THAT THE COMPLAINANT DID NOT ALREADY KNOW THAT THERE WAS A LINK

In ***Roulett v. American Capital Access***, 2004-SOX-78 (ALJ Dec. 22, 2004), the Complainant argued that the time period for filing his SOX whistleblower complaint did not commence until the date that the Respondent filed for registration with the SEC, contending that it was not until that event that he realized that he had been terminated as part of a "housecleaning" effort so that the Respondent's IPO would

not be jeopardized by employees with familiarity with alleged improper acts. The ALJ found that the registration may support the Complainant's belief that he was terminated for protected activity. The Complainant nonetheless had repeatedly advised the Respondent of his belief that certain of its practices were improper, if not illegal, and had not been given a reason for his termination. In view of that, the ALJ found it unreasonable to accept that it was the registration that triggered the Complainant's knowledge of the association between the protected activity and his termination.

PROCEDURE BEFORE ARB

DISMISSAL FOR CAUSE; FAILURE TO FILE APPELLATE BRIEF WITH THE ARB

In ***Cunningham v. Washington Gas Light Co.***, ARB No. 04-078, ALJ No. 2004-SOX-14 (ARB Apr. 21, 2005), the ARB dismissed the Complainant's appeal where he failed to file a brief and failed to file a response to the Board's subsequent show cause order. The show cause order had given the Complainant the option of treating his petition for review as the brief, provided that it was served on the opposing party.

TIMELINESS OF PETITION FOR ARB REVIEW; EQUITABLE GROUNDS FOR RELIEF FROM TIME LIMITATION; NOTICE OF DECISION BY E-MAIL

In ***Flood v. Cendant Corp.***, ARB No. 04-069, ALJ No. 2004-SOX-16 (ARB Jan. 25, 2005), the Complainant was found to have failed to establish equitable grounds for excusing a failure to file a timely request for ARB review where the Complainant received notice of the ALJ's decision by e-mail (the ALJ having agreed to communicate by e-mail to accommodate the Complainant's travel in Europe), but had not filed his request for review within 10 days of that date.

TIMING OF APPEAL OF ALJ'S BIFURCATED DECISION ON THE MERITS AND DAMAGES

Where an ALJ issues a recommended decision on the merits of the case, reserving damages issues for further adjudication, and later issues a decision on damages, the ARB will consider the recommended resolution of the merits and damages claims to have merged into a single final decision, and will review both the merits and damages issues if an appeal is taken at that point. ***Welch v. Cardinal Bankshares Corp.***, ARB No. 05-064, ALJ No. 2003-SOX-15 (ARB Mar. 14, 2005). The Board had earlier found that the Respondent's appeal at the time of the merits decision was interlocutory.

ARB BRIEFING REQUIREMENTS; REFERENCE TO FRAP TO EXCUSE UNTIMELY FILING OF AMICUS BRIEF

In ***Welch v. Cardinal Bankshares Corp.***, ARB No. 05-064, ALJ No. 2003-SOX-15 (ARB May 19, 2005), the ARB referenced the FRAP 29(e) to determine that two petitioners' motions for leave to file amicus briefs were untimely, but nonetheless accepted the briefs for filing "for good cause shown."

PETITION FOR ARB REVIEW; EACH PARTY MUST FILE PETITION FOR REVIEW WITHIN 10 DAYS OF ALJ DECISION; SUBSEQUENT CROSS-PETITIONS ARE NOT PERMITTED

In ***Henrich v. Ecolab, Inc.***, ARB No. 05-036, ALJ No. 2004-SOX-51 (ARB Mar. 31, 2005), the ALJ had ruled that the Complainant had engaged in protected activity and that the Respondent was aware of at least some of that activity, but recommended dismissal of the complaint on the ground that the Complainant had failed to establish that protected activity was a contributing factor in the Respondent's decision to terminate the Complainant's employment. The SOX regulations require the filing of a petition for ARB review within 10 business days of the date of the ALJ's recommended decision and order. The Complainant timely filed a petition for ARB review. Several weeks later the Respondent filed a cross-petition for review.

The ARB noted that the SOX regulations do not provide for cross-petitions for appeal. The Board therefore considered the Respondent's petition to be untimely and looked to determine whether equitable grounds existed for tolling the time period for requesting review. The Respondent argued, essentially, that it would be inefficient to require that that a party file an unnecessary protective appeal in cases in which it would not choose to appeal unless the other party did, and that Congress could not have so intended. The Respondent cited as an example, FRAP 4(a)(3), which applies to appeals of right. The ARB observed that under FRAP 5(b), which governs appeals by permission (as in SOX cases), a party may have to file a protective appeal. The Board held that the SOX rules "do in fact require a party to file a protective appeal that ultimately may be unnecessary."

TIMELINESS OF REQUEST FOR BOARD REVIEW; OBLIGATION OF COMPLAINANT TO CAREFULLY READ ALJ'S NOTICE OF APPEAL RIGHTS

In ***Minkina v. Affiliated Physician's Group***, ARB No. 05-074, ALJ No. 2005-SOX-19 (ARB July 29, 2005), equitable grounds for tolling the period for requesting Board review were not established based on the Complainant's inability to find an attorney nor her confusion over the appeal period because the ALJ's notice of appeal rights informed the Complainant of the process for perfecting an appeal and it was her obligation to read it carefully.

PROCEDURE BEFORE OALJ/GENERALLY

AMENDED COMPLAINT; WHETHER AN ANSWER IS REQUIRED

In ***Gonzalez v. Colonial Bank***, 2004-SOX-39 (ALJ Sept. 14, 2004), the ALJ ruled that the Respondent was not required to file an answer to the Complainant's amendment of his complaint. The ALJ noted that under the Part 1980 rules, the complaint initiates an investigation by OSHA; it is not the type of complaint that initiates a judicial proceeding.

[Editor's note: For rulings on the standards for the amendment of complaints to add a publicly traded company as a respondent, see the "Covered Employer" section of this newsletter]

PROTECTION OF INFORMATION; PRIVACY; CONFIDENTIALITY

SEALING THE RECORD; MOVANT MUST IDENTIFY FACTS SUPPORTING NEED FOR CONFIDENTIALITY

In ***Thomas v. Pulte Homes, Inc.***, 2005-SOX-9 (ALJ Aug. 9, 2005), the Complainant withdrew her objections to the OSHA determination, admitting that her complaint was not timely filed. The Complainant also requested that the entire record be sealed, but did not support her motion with any supporting information or citation of authority. The ALJ reviewed DOL regulations and caselaw, and determined that without an identification of a privacy interest or potential harm or embarrassment that could result from disclosure of the record, or any privileged, sensitive or classified information contained in the record, the Complainant had not established a need for confidentiality. The fact that the motion was unopposed was not dispositive because of the public interest in SOX whistleblower cases. The ALJ also found that the Complainant had not stated a rationale for treating the record as confidential commercial information under the FOIA regulation at 29 C.F.R. § 70.26.

COMPLAINT; STRIKING OF INFORMATION CONTAINING PRIVILEGED ATORNEY-CLIENT COMMUNICATIONS

In ***McClendon v. Hewlett-Packard Co.***, 2004 WL 1421395 (D.Idaho June 9, 2005), the district court struck those portions of the Plaintiff's complaint which contained privileged attorney-client communications where the Plaintiff did not have the authority to waive the evidentiary privilege, which could be waived only by the Defendant's management. The court required the Plaintiff to prepare an amended complaint and attempt to reach an agreement with the Defendant regarding the substance of the amended complaint. The court also granted a protective order to prevent further distribution of the Defendant's privileged and proprietary information.

PROTECTIVE ORDER; SALARIES AND COMPENSATION OF INDIVIDUAL EMPLOYEES; PERFORMANCE EVALUATIONS OF INDIVIDUAL EMPLOYEES; COMPENSATION POLICIES AND PROCEDURES

In ***Cantwell v. Northrop Grumman Corp.***, 2004-SOX-75 (ALJ Feb. 9, 2005), the Respondent moved for a protective order relating to several categories of information being sought in discovery. The ALJ's order contains a summary of relevant regulatory and caselaw precedent regarding when a DOL ALJ may grant a protective order. In regard to the instant case, the ALJ granted a protective order in regard to (1) the specific salary amounts for individual employees under their compensation and incentive compensation plans (at least for the discovery and pretrial stages) and (2) the performance reviews of individual employees. The ALJ denied a protective order in regard to compensation policies and procedures. The Respondent also sought protection for information related to performance review detailing targets, goals and or strategies. The ALJ accepted that protection of marketing and

development plans and strategies was a valid consideration, but rejected secrecy for existing revenues, which are reported.

PROTECTIVE ORDER; MERE FACT THAT COMPLAINANT WORKS FOR A COMPETITOR DOES NOT SUPPORT PROTECTIVE ORDER MOTION WHERE NO EVIDENCE OF ABUSE

In ***Cantwell v. Northrop Grumman Corp.***, 2004-SOX-75 (ALJ Feb. 9, 2005), the ALJ rejected the Respondent's contention in support of its motion for a protective order that the Complainant was working for a competitor and therefore could use confidential information obtained in discovery to compete against them. The ALJ found that there were no facts before her supporting an inference that the Complainant had brought the case for commercial gain or that she had abused the discovery process. Nor had the Complainant or her counsel exhibited any behavior that compromises their ethical duty under the rules of discovery. The ALJ, however, granted the protective order for several categories of information on other grounds.

PROTECTIVE ORDER; SCOPE; NOTICE OF POTENTIAL DISCLOSURE OF PUBLIC RECORDS

In ***Cantwell v. Northrop Grumman Corp.***, 2004-SOX-75 (ALJ Feb. 9, 2005), the ALJ granted a protective order in regard to several categories of information. The ALJ, however, clarified that the protective order was limited in scope: it only applied to the discovery and prehearing phases of the litigation and it did not limit the Complainant from using the information in litigating the claim. The ALJ observed that the Respondent could request confidentiality when such evidence is offered and that certain information could be redacted when feasible. The ALJ warned that confidential information may become part of the public record through the issuance of a decision, pretrial order and trial testimony, although the Respondent may request predisclosure notification pursuant to DOL's FOIA Exemption 4 regulations at 29 C.F.R. § 70.26.

COVERED EMPLOYER

AMENDMENT OF COMPLAINT TO ADD PUBLICLY TRADED PARENT COMPANY

In ***McIntyre v. Merrill Lynch, Pierce, Fenner & Smith, Inc.***, 2003-SOX-23 (ALJ Sept. 4, 2003), the ALJ permitted the Complainant to amend the complaint to add the publicly traded parent company as a named Respondent, finding that there was "a genuine issue of material fact concerning the subsidiary's actions as an agent with arguable express, implied and apparent authority to act on behalf of its parent...." The ALJ distinguished the ALJ's decision *Powers v. Pinnacle Airlines, Inc.*, 2003-AIR-12 (ALJ Mar. 5, 2003) (*Powers* involved an indirect subsidiary, whereas the instant case involved a direct subsidiary).

COVERED EMPLOYER; FDIC

The Federal Deposit Insurance Corporation is not a covered employer under the SOX whistleblower provision. ***Gibson-Michaels v. Federal Deposit Insurance Corp.***, 2005-SOX-53 (ALJ May 26, 2005).

EMPLOYER; CONTRACTOR OR SUBCONTRACTOR CANNOT DISCRIMINATE ON BEHALF OF COVERED EMPLOYER, BUT COMPLAINANT MUST NEVERTHELESS BE AN EMPLOYEE OF THE COVERED EMPLOYER TO HAVE SOX COVERAGE

The named Employer was neither a publicly traded company nor a subsidiary of a publicly traded company. The Complainant argued it was a contractor or subcontractor of various publicly traded companies, and therefore she should be considered a covered employee based upon the inclusion in Section 806 of the language referring to "any officer, employee, contractor, subcontractor, or agent of such company." 18 U.S.C. 1514A(a). The ALJ held, however, that "this language simply lists the various potential actors who are prohibited from engaging in discrimination on behalf of a covered employer. It does not bridge the gap in this case which is created by the fact that the Complainant is not an employee of a publicly traded company. That is, while it is at least theoretically possible that a privately held entity such as APG could engage in discrimination prohibited by Section 806 when acting in the capacity as an agent of a publicly traded company in regard to an employee of that company, there is nothing in the language of Sarbanes-Oxley or its legislative history that suggests that Congress intended to bring the employees of non-public contractors, subcontractors and agents under the protective aegis of Section 806." ***Minkina v. Affiliated Physician's Group***, 2005-SOX-19 (ALJ Feb. 22, 2005).

[Editor's note: Compare ***Kalkunte v. DVI Financial Services, Inc.***, 2004-SOX-56 (ALJ July 18, 2005), casenoted *infra*, in which the ALJ found that a "turnaround specialist" firm could be held liable under SOX where that company's president had been installed as the CEO and president of the company it was helping through bankruptcy and which actually employed the Complainant.]

COVERED EMPLOYER; SUBSIDIARY AND PARENT NOT SO INTERTWINED AS TO BE ONE ENTITY; PARENT NOT NAMED AS A RESPONDENT

In ***Hughart v. Raymond James & Associates, Inc.***, 2004-SOX-9 (ALJ Dec. 17, 2004), the Complainant did not name, and was not seeking relief from, the parent company. The named Respondent was a wholly owned subsidiary, which was neither a publicly traded company with registered securities nor required to file reports under section 15(d) of the Securities Exchange Act. Consequently, the ALJ found that the Respondent was liable under the whistleblower provision of SOX "only if the parent company and its wholly owned subsidiary are so intertwined as to represent one entity." Slip op. at 44. The ALJ concluded that "in an employment discrimination case, the parent company will only be held liable where it controlled or influenced the work environment of, or termination decision about, an employee of its subsidiary company." *Id.*

In the instant case, there were indicia that the parent controlled some operational aspects of the subsidiary. The Complainant's employee benefits (including pharmacy benefits, health insurance, stock purchase plans and profit sharing plans) were provided by the parent company. He was subject to the parent company's ethics policy. The letterhead used by the subsidiary contained both its own logo and the parent company's logo, with address. Portions of the two companies were housed at the same location.

The ALJ found, however, that other evidence established that the parent and subsidiary were not so inseparable as to be considered one entity subject to the whistleblower provision of SOX. The Complainant's paychecks were issued by the subsidiary, and there was no evidence of the funds of the parent and subsidiary were commingled. Nearly all the workers with whom the Complainant had day-to-day contact were employees of the subsidiary, and he only very occasionally came into contact with employees of the parent. His supervisors were all employees of the subsidiary. There was no indication that the subsidiary was acting as an agent for the parent with respect to employment practices toward the Complainant. The subsidiary had its own human resources department that was solely responsible for interacting with its employees.

The ALJ noted that several ALJs had held that a parent company subject to SOX may be held liable for SOX violations of a wholly owned subsidiary, but that the parent company must be named in the complaint to extend such liability.

COVERED EMPLOYER; JOINT VENTURE OF TWO CORPORATIONS

In ***Mann v. United Space Alliance, LLC***, 2004-SOX-15 (ALJ Feb. 18, 2005), the ALJ granted summary judgment to the Respondents on the ground that none the named Respondents were employers for purposes of the employee protection provision of the SOX. The Complainant was employed by United Space Alliance (USA), which was a limited liability company equally owned by Boeing and Lockheed Martin. The ALJ found that there was no evidence that Boeing or Lockheed could have affected, or did affect, the Complainant's employment with USA, or that USA was acting as their agent with respect to the Complainant's employment. *See* 29 C.F.R. § 1980.101. While those companies participated in the hiring and dismissing of USA's president and CEO, it was the responsibility of USA's president and CEO to hire and dismiss management and other employees of USA, and to establish the terms of their employment.

The ALJ also considered whether the fact that Boeing and Lockheed owned USA brought them under the coverage of SOX. Although USA did not have a class of securities registered under section 12 of the SEA nor was it required to file reports under section 15(d) of the SEA, the Complainant argued that it was the agent of the two ownership companies.

The ALJ found no prior precedent addressing the applicability of SOX to a joint venture, but looked to cases involving subsidiaries, finding that in all those cases "shared management and control and unity of operations have been key factors in holding the parent company and its subsidiary to be covered by the Act." Slip op. at

9 (citations omitted). The ALJ found that such factors were not present in the instant case.

COVERED EMPLOYER; NAMED RESPONDENT NOT A PUBLICLY TRADED COMPANY; FAILURE TO NAME PUBLICLY TRADED PARENT CORPORATION; FAILURE TO AMEND COMPLAINT TO ADD A COVERED EMPLOYER

Where the Complainant brought his complaint against his employer alone, that employer was not a publicly traded company, and the Complaint did not name any parent company that may be publicly traded, and did not move to amend his complaint, the ALJ granted summary decision to the Respondent employer on the ground that it was not a covered employer. The ALJ also noted that no parent companies had participated before OSHA and that there was no indication that the parent companies were sufficiently involved in the management and employment relations of the Respondent to justify a piercing of the corporate veil. ***Dawkins v. Shell Chemical, LP***, 2005-SOX-41 (ALJ May 16, 2005).

COVERED EMPLOYER; FAILURE TO NAME PUBLICLY TRADED COMPANY AND TO PROVE THAT THE COMPANY FITS WITHIN THE SOX DEFINITION OF A COVERED EMPLOYER

In ***Grant v. Dominion East Ohio Gas***, 2004-SOX-63 (ALJ Mar. 10, 2005), the ALJ sua sponte raised the issue of whether the Complainant had established whether the named Respondent was a publicly traded company subject to the whistleblower provision of SOX. The ALJ stated that a complainant cannot maintain a SOX whistleblower action "unless he names a publicly traded company as Respondent, *and* establishes that the named Respondent is actually covered by the Act." Slip op. at 33 (citation omitted; emphasis as in original). The ALJ found that the Complainant had failed to name a publicly traded company as Respondent and made no attempt to prove that Respondent or its parent company were in fact publicly traded or otherwise covered by the Act, despite sufficient opportunity to do so. The ALJ also observed that even if the Complainant had named the parent company as a Respondent, and that parent company was shown to be a publicly traded company, the mere fact of a parent-subsidiary relationship would not establish liability; rather evidence must be presented to justify piercing the corporate veil. Finally, the ALJ indicated that the mere fact that there exists a doctrine of piercing the corporate veil does not "operate to pull a parent company into litigation if the parent company is not named in the first place." The ALJ noted that the Complainant had been represented by counsel, but had filed his complaint solely against the subsidiary, that the parent had never been a party to the claim, and that the Complainant had never taken any steps to cure this deficiency. The ALJ, therefore, found that the failure to establish a covered respondent under the Act was grounds for dismissal of the complaint.

COVERED EMPLOYEE; WORK EXCLUSIVELY OUTSIDE THE UNITED STATES

In ***Ede v. Swatch Group***, 2004-SOX-68 and 69 (ALJ Jan. 14, 2005), the ALJ dismissed the complaints of two Complainants because their work for the Respondent occurred exclusively outside of the United States. The ALJ cited agreement with *Carnero v. Boston Scientific Corp.*, No. Civ.A.04-10031 RWZ, 2004

WL 1922132 (D.Mass. Aug. 27, 2004), *appeal docketed*, No. 04-2291 (1st Cir. Sept. 30, 2004), in regard to the proposition that the whistleblower provision of the SOX "applies only to employees working within the United States."

[Editor's note: The Assistant Secretary for OSHA has filed an appellate amicus brief before the ARB urging the Board to hold that "section 806 does not apply extraterritorily to employees who work overseas and are subjected to adverse action overseas." Brief at 14.]

COVERED EMPLOYER; EMPLOYER WHICH FILES A REGISTRATION BUT WITHDRAWS IT BEFORE APPROVAL

In ***Roulett v. American Capital Access***, 2004-SOX-78 (ALJ Dec. 22, 2004), the Respondent had filed a registration with the SEC in preparation for an IPO, but subsequently obtained private financing and withdrew the registration before any approval by an exchange or the SEC was effected. The Securities Exchange Act provides that a registration does not become effective until it is approved by the relevant exchange authorities who must then certify to the SEC that the security has been approved. The ALJ held, therefore, that the Respondent never registered a class of securities under section 12 of the Securities Exchange Act of 1934.

COVERED EMPLOYER; "COMPANY REPRESENTATIVE" STATUS IS NOT CONFERRED MERELY BECAUSE FINANCIAL SERVICES ARE PROVIDED TO A PUBLICLY TRADED COMPANY

In ***Roulett v. American Capital Access***, 2004-SOX-78 (ALJ Dec. 22, 2004), the Respondent provided insurance for registered companies in connection with debt securities of publicly traded companies, and associated services. The Complainant argued that the SOX whistleblower provision extended to the Respondent because it is a "company representative" for publicly traded companies. The ALJ found that the only merit to this argument was its creativity. The ALJ declined "to expand [coverage under the whistleblower provision of the SOX] to a non-publicly traded company solely because it engages in financial business with publicly traded companies."

COVERED EMPLOYER; EMPLOYER DID NOT SEEK REGISTRATION UNTIL AFTER THE COMPLAINANT HAD BEEN TERMINATED FROM EMPLOYMENT

In ***Roulett v. American Capital Access***, 2004-SOX-78 (ALJ Dec. 22, 2004), the Respondent had filed a registration with the SEC in preparation for an IPO, but subsequently obtained private financing and withdrew the registration before any approval by an exchange or the SEC was effected, and the ALJ consequently found that it was not a covered employer under the whistleblower provision of the SOX. The ALJ also found that, even if the application had been approved by the SEC, the Respondent had not filed until after the Complainant had already been terminated from employment. The ALJ found that SOX may not be applied retroactively to confer coverage before a company meets the jurisdictional requisites.

COVERED INDIVIDUALS AND ENTITIES; HARMONIZATION AND CLARIFICATION OF REGULATIONS TO LIMIT LITIGATION TO PERSONS OR ENTITIES IN A POSITION TO EFFECT TERMS AND CONDITIONS OF EMPLOYMENT

In ***Gallagher v. Granada Entertainment USA***, 2004-SOX-74 (ALJ Oct. 19, 2004), the Complainant sought to amend his complaint to name additional Respondents, including the executive who terminated his employment, and "any person or business entity ... whose acts in concert with or at the direction of the Employer ... lead to" his discharge. Slip op. at 3, quoting Complainant's motion.

The ALJ noted that the SOX whistleblower statute and regulations are broader in scope that previous types of whistleblower cases under DOL's jurisdiction in that they do not restrict the parties to a complainant and an employer, but require the Secretary to give notice that a complaint has been filed to both "the employer" and "the person named in the complaint." The ALJ reviewed the applicable laws and regulatory history and sought to harmonize the regulations and clarify who could be named as a party. The ALJ concluded that the regulations imply that only someone in a position to take unfavorable personnel actions would be a "named person." The ALJ also found that the regulations imply "that any 'named person' would have had direct authority over a complainant, and are consistent with the assumption [made in the regulatory history] that the employer and the named person(s) ordinarily are the same."

The ALJ thus concluded that the executives named as those who terminated the Complainant's employment could be added as "named parties." The ALJ denied addition of the "acting in concert" group (which the Respondent estimated would add more than 30 individuals or entities to the litigation). The ALJ concluded that the regulations did not contemplate expansion of Respondents to that extent, but limited individuals as parties to superiors who could discriminate against the Complainant in regard to the "'terms or conditions of his employment' as Congress used the phrase in 18 U.S.C. § 1514(A) and the Secretary applied it in 29 C.F.R. § 1980.102(a)."

The ALJ acknowledged that SOX permits compensation for special damages [in other words, SOX is not limited to equitable relief which can only be provided by the corporate Employer], but concluded that "[t]he availability of damages does not convert this statutory proceeding into a common law tort action, permitting joinder of persons or entities who were not the Complainant's superiors as if they were joint tortfeasors."

COVERED EMPLOYER; COVERAGE UNDER SOX AT THE TIME OF THE ADVERSE ACTION

In ***Gallagher v. Granada Entertainment USA***, 2004-SOX-74 (ALJ Apr. 1, 2005), the Respondent was not a publicly traded company subject to SOX at the time that it made the decision not to promote the Complainant following a contemplated merger. After the merger, however, the Respondent became a company subject to the requirements of sections 12 or 15(d) of the Securities and Exchange Act. The decision not to renew the Complainant's employment contract was made after the

merger. Thus, the Respondent was not a covered employer at time of the refusal to promote but was a covered employer at the time of the non-renewal of the employment contract.

NON-PUBLICLY TRADED FIRM SPECIALIZING IN RESTRUCTURING SERVICES FOR COMPANIES IN DISTRESS FOUND TO BE A LIABLE CONTRACTOR OR AGENT

AMENDMENT OF COMPLAINT TO ADD RESPONDENT; TOO LATE AFTER EVIDENTIARY HEARING COMPLETED

In ***Kalkunte v. DVI Financial Services, Inc.***, 2004-SOX-56 (ALJ July 18, 2005), one Respondent was a firm that provides crisis management and restructuring services to companies in financial distress ("AP Services"). The other Respondent ("DVI Financial" or "DVI") was a financial services company that had contracted with AP Services to provide leased employees to manage DVI through bankruptcy and dissolution. DVI was a publicly traded company, but AP Services was not. The Complainant was a DVI employee. The President of AP Services, Mr. Toney, was appointed by the DVI Board of Directors as temporary President and CEO of DVI upon filing for Chapter 11 protection. The chief protagonist as described in the complaint was Mr. Toney. There was no dispute that DVI was a covered employer, but the question was presented whether AP Services could be held liable

The ALJ reviewed the facts and relevant law, and concluded that AP Services was a properly named Respondent because (1) it was a subcontractor or contractor, (2) it had assumed respondeat superior liability to the Complainant, (3) it was an agent under the statute, and (4) the Complainant could also be viewed as a third party beneficiary to the agreement between the Respondents. The ALJ rejected AP Services argument that it had to actually employ the Complainant to be covered under the SOX, writing:

> DVI contracted to AP the power to determine how best to manage the corporation and its assets in light of the pending bankruptcy. ... Included in those powers was the power to evaluate DVI's employees' value to the company and to terminate those who were no longer needed. ... Mr. Toney, as CEO, had the authority to terminate anyone at DVI, and Ms. Clay [an AP Services employee brought to DVI to work on Human Resources issues] testified that she performed the duties of Chief Administrative Officer as part of her duties at DVI. Thus AP, through Mr. Toney and Ms. Clay, had the power to affect Ms. Kalkunte's employment

Slip op. at 9 (citations to the record omitted). Following the evidentiary hearing before the ALJ, the Complainant moved to amend the complaint to name Mr. Toney as a Respondent. The ALJ recounted the procedural history of the case, and -- finding that although he had left the record open following the hearing the scope of that ruling did not include naming an additional party -- denied the motion.

[Editor's note: Compare ***Minkina v. Affiliated Physician's Group***, 2005-SOX-19 (ALJ Feb. 22, 2005), *supra*, in which the ALJ held that employees of non-publicly

traded contractors, subcontractors and agents are not under the protective aegis of Section 806]

INTERLOCUTORY APPEAL OF AMENDMENT OF COMPLAINT TO NAME PUBLICLY-HELD PARENT COMPANY AS A RESPONDENT

In ***Gonzalez v. Colonial Bank***, ARB No. 05-060, ALJ No. 2004-SOX-39 (ARB May 31, 2005), the ALJ had granted the Complainant's motion to amend his complaint to add the publicly-held parent company as a Respondent. The ALJ denied the Respondent's motion for reconsideration and for certification of an interlocutory appeal. The Board found that the ALJ did not abuse his discretion in denying certification of the interlocutory appeal because the issue of whether the complaint could be amended to relate back is not a purely legal question, but a mixed question of law and fact. The ALJ was required to determine whether the party to be added received notice of the filing of the action such that it would not be prejudiced in maintaining a defense, and whether the party knew, or should have known that, but for a mistake concerning the identity of the proper party, the complainant would have brought an action against the proper party. The Board also found that the ALJ correctly determined that even if the amendment did not relate back, the issue of first impression of whether a subsidiary of a publicly-held company falls within SOX's coverage, would remain. The Board also rejected the argument that the relation-back issue is a threshold jurisdictional issue -- timeliness is not a jurisdictional bar because SOX's limitations period for filing a complaint is subject to equitable tolling. Finally, the Board held that even if the ALJ had certified the question it would have not exercised its discretion to hear the appeal because of the Board's strong policy against piecemeal appeals.

AMENDMENT TO COMPLAINT; WHEN PERMITTED

In ***Gonzalez v. Colonial Bank***, ARB No. 05-060, ALJ No. 2004-SOX-39 (ARB May 31, 2005), the Respondent had filed an interlocutory appeal of the ALJ's order granting the Complainant's motion to amend his complaint to add the publicly-held parent company as a Respondent. Although the Board denied interlocutory review, and therefore did not rule on whether the ALJ properly granted the motion, the Board stated the following about an ALJ's authority to permit an amendment of the complaint:

> An administrative law judge may permit a complainant to amend a complaint when the amendment is reasonably within the scope of the original complaint, the amendment will facilitate a determination of a controversy on the merits of the complaint and there is no prejudice to the public interest and the rights of the parties. An amended complaint will relate back to the original complaint for purposes of determining the timeliness of the complaint when the amendment adds a party against whom a claim is asserted if the claim in the amended pleading arose out of the conduct, transaction, or occurrence described in the original pleading. Furthermore, an amended complaint relates back if, within the limitations period, the party to be added received notice of the filing of the action such that the party will not be prejudiced in maintaining a

> defense on the merits, and the party knew or should have known that, but for a mistake concerning the identity of the proper party, the complainant would have brought an action against the proper party.

Id., slip op. at 3 (footnotes omitted).

Related orders: ***Gonzalez v. Colonial Bank***, 2004-SOX-39 (ALJ Aug. 17, 2004) (Order Granting Motion to Amend Complaint); ***Gonzalez v. Colonial Bank***, 2004-SOX-39 (ALJ Dec. 20, 2004) (Order Denying Motion to Reconsider Order on Motion for Leave to Amend Complaint); ***Gonzalez v. Colonial Bank***, 2004-SOX-39 (ALJ Feb. 7, 2005) (Order Denying Request for Certification of Interlocutory Appeal).

BURDEN OF PROOF AND PRODUCTION -- ADVERSE EMPLOYMENT ACTION

ADVERSE ACTION; FAILURE TO PROMOTE; ABSENCE OF EVIDENCE THAT COMPLAINANT ACTUALLY APPLIED FOR POSITION

In ***Hughart v. Raymond James & Associates, Inc.***, 2004-SOX-9 (ALJ Dec. 17, 2004), the ALJ found that the Complainant did not establish an adverse action based on failure to promote where the Complainant did not present sufficient evidence to establish that he actually applied for a position for which he met the requisite qualifications.

HOSTILE WORK ENVIRONMENT; CRITIQUE OF MANNER OF COMMUNICATIONS AND TRANSFER OF ISSUES TO OTHER DEPARTMENTS FOR RESOLUTION

In ***Hughart v. Raymond James & Associates, Inc.***, 2004-SOX-9 (ALJ Dec. 17, 2004), the ALJ found that severe critique of the manner in which the Complainant handled inter-departmental communications, and the managerial decision to transfer an issue raised by the Complainant to another department, did not rise to the level of a hostile work environment. The ALJ found that although the Complainant was offended by the transfer, the decision to do so did not appear to be abusive because the Complainant's position was specifically to discover and research pending problems; once the source of a problem was found, the supervisors had discretion to transfer the matter to a department better suited, in their opinions, to resolve the issue. The Complainant had consistently received positive performance appraisals; the appraisals acknowledged the Complainant's value to the company, but also identified a tendency to be overzealous. The ALJ found that the supervisors were appropriately reacting to the situations created by the Complainant's methods and procedures.

CONSTRUTIVE DISCHARGE; SUPERVISOR'S CRITICISM OF E-MAIL COMMUNICATION STYLE AND STATEMENT THAT COMPLAINANT'S EMPLOYMENT STATUS WOULD BE CONSIDERED OVER THE WEEKEND; SUBJECTIVE STRESS VERSUS OBJECTIVE VIEW OF SITUATION

In ***Hughart v. Raymond James & Associates, Inc.***, 2004-SOX-9 (ALJ Dec. 17, 2004), the Complainant had determined that certain shares of limited partnerships were being improperly traded over-the-counter, and - to alert his supervisors - sent an e-mail outlining his concerns. The e-mail was titled "fraud alert." In a meeting, the Complainant's supervisor expressed her disagreement with the Complainant's determination but reserved judgment because of her observation that neither she nor the Complainant were experts in the subject; the Complainant adamantly disagreed. The supervisor then criticized the Complainant's use of the term "fraud alert," stating that it was inappropriate, that it was an example of his tendency to overstate and mis-communicate, and that she could not continue to permit him to communicate in such manner. She stated that she had to consider his employment status over the weekend and threatened to terminate him if he continued to mis-communicate. The Complainant did not understand the criticism and felt abandoned by his supervisor, misunderstood and the verge of being fired.

The ALJ found that the Complainant's responses and feeling at this end of this meeting were understandable, but that the meeting had not objectively created a work environment so completely hostile that he had no choice but to resign. The ALJ noted that rather than resign, the Complainant could have accepted the feedback and committed to changing his e-mail communication style. The ALJ also noted that the supervisor was apparently conflicted. The Complainant was recognized as a valuable employee, but had in her view significant problems with his communication style. When the Complainant returned to offer his resignation, the supervisor did not simply accept it but stated that she was not firing him and that he needed to think about what he was doing.

The ALJ recognized that the supervisor's statements may be considered a threat of termination, but observed that there was no evidence of a pattern of such threats or other abuse by the supervisor such that the Complainant was compelled to resign. The ALJ acknowledged that the Complainant's perception of stress may have been subjectively accurate, but viewed objectively, the supervisor's criticism did not rise to the level of abuse that justified resignation.

ADVERSE EMPLOYMENT ACTION; COMPLAINANT'S SUBJECTIVE BELIEF THAT HE WAS FIRED VERSUS OBJECTIVE VIEW OF SITUATION

In ***Harvey v. Safeway, Inc.***, 2004-SOX-21 (ALJ Feb. 11, 2005), the ALJ found that although the Complainant may have had a understandable subjective belief that he had been fired when he received a phone message indicating that he should not come into work because he was not on the schedule, this interpretation of the phone message was not objectively reasonable. The record showed that the Complainant was anticipating being fired; however, the objective facts showed otherwise. Among other factors, the message only passed on information that the Complainant was not on the schedule. The Complainant remained on the schedule for several shifts for

another two weeks after the phone message. Although his manager may have been unhappy with him, the Complainant had received assurances from the Respondent's corporate counsel that he would not be terminated for raising his concerns.

ADVERSE EMPLOYMENT ACTION; TANGIBLE JOB CONSEQUENCE ANALYSIS VIS-A-VIS TITLE VII INTERPRETATIVE LAW IN CIRCUIT IN WHICH CASE AROSE; UNDER AN EXPANSIVE DEFINITION, PLACEMENT ON A LAY-OFF LIST IS ADVERSE ACTION, BUT NON-SEVERE AND NON-PERVASIVE ACTIONS ARE NOT

In ***Hendrix v. American Airlines, Inc.***, 2004-AIR-10, 2004-SOX-23 (ALJ Dec. 9, 2004), the ALJ thoroughly analyzed discordant administrative decisions relative to the meaning of "adverse action" under various whistleblower laws, and specifically the concept of tangible job consequence. She concluded that, although Title VII decisions are not binding precedent for purposes of a whistleblower claim, they provide helpful guidance. The ALJ also concluded that she should look to the law of circuit in which the claim arises. Because the instant case alleging violations of both the AIR21 and SOX whistleblower laws arose in the Tenth Circuit, she applied the expansive definition of adverse action found in *Hillig v. Rumsfeld*, 381 F.3d 1028 (10th Cir. 2004), in which the court held that the fact that unlawful personnel action turned out to be inconsequential goes to damages, not liability, although the standard does not encompass mere inconvenience or alteration of job responsibilities. In a footnote, the ALJ observed that the Sarbanes Oxley Act contains language, unlike other whistleblower laws, explicitly prohibiting threats and harassment -- acts which are not necessarily tangible and not ultimate employment actions.

Applying this standard, the ALJ found that the Complainant's placement on a lay-off list constitutes an adverse action, even though the Complainant suffered no tangible consequence as his name was removed before the lay-offs took effect. [Later in the decision, however, the ALJ found that there was no connection between protected activity and the placement on the lay-off list].

The Complainant also raised a hostile work environment claim. The ALJ initially parsed out which portions of the claim were timely raised. She found that claims of verbal abuse, assignment to a second shift, and denial of access to computer resources were timely raised. The ALJ, however, found these actions were not so severe and pervasive that they altered the terms of the Complainant's employment -- they were the kinds of inconvenience an employee should expect to endure in the normal workplace.

ADVERSE ACTION; TANGIBLE JOB CONSEQUENCES; ERROR RATE INCREASE; WORKSPACE REALLOCATION

In ***Allen v. Stewart Enterprises, Inc.***, 2004-SOX-60, 61 and 62 (ALJ Feb. 15, 2005), the ALJ found that neither a higher error rate nor workspace reallocations had sufficiently tangible job consequences to constitute adverse employment action. Although several Complainants' bonuses were tied to low error rates, both employees continued to achieve good work evaluations and they did not show any tangible job consequence. Similarly, although several Complainants were unhappy

with new workspace because it did not have some amenities of their old workspace, the new workspace did not compromise their ability to complete job tasks or negatively affect their employment. The ALJ also pointed out that none of the Complainants had been singled out in regard to the error rates or workspace allocations. The increased error rate standard applied to the entire division and the workspace reallocation applied to other workers besides the Complainants.

BURDEN OF PROOF AND PRODUCTION -- CAUSATION

EVIDENCE; ADVERSE INFERENCE; LACK OF DOCUMENTATION OF NON-DISCRIMINATORY REASONS FOR ADVERSE ACTION

In ***Allen v. Stewart Enterprises, Inc.***, 2004-SOX-60, 61 and 62 (ALJ Feb. 15, 2005), the ALJ rejected the Complainants' contention that the Respondent's lack of documentation stating why they had been selected for a RIF supported an inference of discrimination. The Complainants cited *Tyler v. Union Oil Co. of California*, 304 F.3d 379 (5th Cir. 2002), an age discrimination case in which the employers failed to follow its HR Manual instruction to document non-discriminatory reasons for adverse personnel decisions. The court in that case concluded that such a failure may, in appropriate circumstances, support an inference of discrimination if the employee establishes some nexus between the employment action and protected activity. The ALJ distinguished *Tyler* because the Respondent's HR guide in the instant case did not prescribe such an analysis in selection for layoffs; moreover, the Complainants had not established a nexus between their alleged protected activity and the employment action. The ALJ also noted that the SOX does not mandate documentation of employment actions.

CAUSATION; SUMMARY DECISION APPROPRIATE WHERE RECORD DOES NOT SUPPORT A FACTUAL OR LEGAL INFERENCE OF RETALIATORY DISCRIMINATION

In ***Gallagher v. Granada Entertainment USA***, 2004-SOX-74 (ALJ Apr. 1, 2005), the ALJ granted summary decision in favor of the Respondent where, *inter alia*, the Complainant failed to make out a triable issue of fact on the causation element of his claim. The Complainant learned that he was not to receive an expected promotion to Senior Vice President following a merger, and after he presented a set of demands and refused to report to the Respondent's choice for the position, a decision was made not to renew his employment contract. For purposes of summary decision, the ALJ assumed that the Complainant had complained about violations of laws relating to fraud against shareholders. The ALJ found, however, that there was insufficient evidence in the record to support a factual or legal inference of retaliatory discrimination, citing *Hasan v. U.S. Dept. of Labor*, __ F.3d __, 2005 WL 578791 (7th Cir. Mar. 14, 2005). In that case, the 7th Circuit had affirmed an ARB ruling on a job applicant case that a Complainant must show that "only he and not any similarly situated job applicant who did not file [a safety complaint] was not hired even though he was qualified for the job for which he was applying." *Id.*, 2005 WL 578791 at *1. In the instant case, the Complainant's counterpart at the other merged company was not made a senior vice president but was laid off, and a more senior executive than the Complainant was demoted in the reorganization as

compared to his pre-merger status. Neither had made any whistleblower complaints. The ALJ also noted that had there been an intent to retaliate against the Complainant, he would have been the obvious layoff candidate rather than his counterpart at the other company being merged.

BURDEN OF PROOF AND PRODUCTION -- PROTECTED ACTIVITY

PROTECTED ACTIVITY; MUST IMPLICATE FRAUD

In ***Tuttle v. Johnson Controls Battery Division***, 2004-SOX-76 (ALJ Jan. 3, 2005), the Complainant's SOX whistleblower complaint was grounded in the allegation that he was terminated due to complaints to the Respondent that significant numbers of its batteries were defective. The ALJ granted summary judgment against the Complainant because the complaint did "not address any kind of fraud or any transactions relating to securities. Moreover, there has been no allegation that the activities complained of involved intentional deceit or resulted in a fraud against shareholders or investors." Slip op. at 3-4. The ALJ wrote:

> The legislative history of the Act makes it clear that fraud is an integral element of a cause of action under the whistleblower provision. *See, e.g*. S. Rep. No. 107-146, 2002 WL 863249 (May 6, 2002) (explaining that the pertinent section "would provide whistleblower protection to employees of publicly traded companies who report acts of fraud to federal officials with the authority to remedy the wrongdoing or to supervisors or appropriate individuals within their company.") The provision is designed to protect employees involved "in detecting and stopping actions which they reasonably believe are fraudulent." *Id*. In the securities area, fraud may include "any means of disseminating false information into the market on which a reasonable investor would rely." *Ames Department Stores Inc., Stock Litigation*, 991 F.2d 953, 967 (2d Cir. 1993) (addressing SEC antifraud regulations). While fraud under the Act is undoubtedly broader, an element of intentional deceit that would impact shareholders or investors is implicit.
>
> Protected activity is defined under SOX as reporting an employer's conduct which the employee reasonably believes constitutes a violation of the laws and regulations related to fraud against shareholders. While the employee is not required to show the reported conduct actually caused a violation of the law, he must show that he reasonably believed the employer violated one of the laws or regulations enumerated in the Act. Thus, the employee's belief "must be scrutinized under both subjective and objective standards." *Melendez v. Exxon Chemicals Americas*, ARB No. 96-051 (July 14, 2000).

PROTECTED ACTIVITY; ENVIRONMENTAL CLAIM NOT RELATED TO SHAREHOLDER FRAUD IS NOT PROTECTED ACTIVITY

The ALJ found that the Complainant was not engaged in protected activity under the SOX where her reports concerned air quality and had nothing to do with fraud or the protection of investors. The ALJ was not convinced otherwise by the Complainant's speculation that poor air quality might ultimately result in financial loss to the Respondent. The ALJ granted summary judgment to the Respondent based on the Complainant's failure to establish an essential element of a *prima facie* case. ***Minkina v. Affiliated Physician's Group***, 2005-SOX-19 (ALJ Feb. 22, 2005).

PROTECTED ACTIVITY; REFUSAL TO CHANGE STOCK RATING NOT PROTECTED ACTIVITY UNLESS ANALYST COMMUNICATED CONCERN THAT EMPLOYER'S CONDUCT CONSTITUTED A VIOLATION OF LAW

In ***Getman v. Southwest Securities, Inc.***, ARB No. 04-059, ALJ No. 2003-SOX-8 (ARB July 29, 2005), the Complainant was a stock analyst appearing before a company stock review committee. The ARB held that the Complainant's refusal to change her stock rating, done in the presence of her managers, was not protected activity. The Board wrote:

> In our view, her unspecified "refusal" [to sign her name to a "strong buy" recommendation] was not sufficient to "provide information" to a person with supervisory authority relating to a violation. In the context of a review committee meeting between an analyst and her supervisor, where disagreement over a rating may be a normal part of the process, the analyst must communicate a concern that the employer's conduct constitutes a violation in order to have whistleblower protection. While there may be times where only refusal is sufficient to provide information, reviewing Getman's evidence in the light most favorable to her, it was not in this case.
>
> In drafting whistleblower protection laws, Congress, after all, has drawn the distinction between notifying the employer of a violation and refusing to commit a violation. *See, e.g.,* Energy Reorganization Act (ERA), 42 U.S.C.A. § 5851(a)(1)(A), (B) (West 2003) (extending coverage to an employee who "notified" his employer of an alleged violation **or** "refused" to engage in an unlawful practice **if** the employee has "identified the alleged illegality to the employer"); Surface Transportation Assistance Act (STAA), 49 U.S.C.A. § 31105(a)(1) (West 1997) (providing protection for an employee who files a "complaint" related to a motor vehicle safety regulation **or** "refuses to operate" a vehicle **because** it would violate a safety regulation or the employee reasonably believes the vehicle is unsafe). If Congress had wanted to protect a refusal as distinct from providing information, it could have done so in drafting the SOX. We therefore conclude that Getman's unexplained refusal to change her recommended rating of the Cholestech stock was not protected activity.

USDOL/OALJ Reporter at 9-10.

PROTECTED ACTIVITY; COMPLAINANT'S PERSONAL WAGE PAYMENT PROBLEMS DID NOT RISE TO LEVEL OF CAUSING A MATERIAL INACCURACY IN THE RESPONDENT'S FINANCIAL REPORTS

In ***Harvey v. Safeway, Inc.***, 2004-SOX-21 (ALJ Feb. 11, 2005), the Complainant contended that his complaints about shortages in his pay constituted protected activity under the whistleblower provision of the Sarbanes-Oxley Act. The ALJ concluded that, "while complaints of systemic violation of the [the Fair Labor Standards Act] might reach the necessary magnitude to effectively perpetuate a fraud on shareholders," slip op. at 30, Section 302 of the SOX (corporate officer certification of financial disclosure) "establishes a requirement for the accuracy of material facts relating to finances." *Id*. at 31 (emphasis as in original). The ALJ concluded that "[t]his provision demonstrates Congress' intention to protect shareholders by requiring accurate reporting of significant information concerning a corporation's financial condition." *Id*. (emphasis as in original). The ALJ concluded that the Complainant's reports of underpayment of his wages failed to reach the requisite level of materiality -- even if uncorrected -- they "would have a microscopic, if any, effect on any financial report prepared by [the Respondent] for the benefits of its shareholders." *Id*. The ALJ also found that the Respondent had attempted to remedy the underpayments in a timely manner, and therefore its financial reports were not likely to have been affected by the temporary wage shortages. The Complainant alleged that underpayments were systematic - thereby increasing the Respondent's profits from unpaid wages. The ALJ, however, found that the Complainant had not presented an objectively reasonable factual foundation for this allegation.

PROTECTED ACTIVITY; DISCLOSURE TO PERSON WITH AUTHORITY TO INVESTIGATE AND ACT; COMPANY'S DEALINGS WITH UNLICENSED BROKER RELATING TO PRIVATE PLACEMENT; DIRECTION TO TURN OVER FILE TO AUDITORS; REFUSAL TO ATTEND MEETING

In ***Jayaraj v. Pro-Pharmaceuticals, Inc.***, 2003-SOX-32 (ALJ Feb. 11, 2005), the Complainant was Vice-President of Investor Relations for a small biotech company working to increase volume and price of publicly traded stock and engaged in a private placement offering. The Complainant was fired because she raised concerns about an unlicensed broker's activities relative to the private placement. The ALJ found that the Complainant had a reasonable basis for concluding that this was not proper (the ALJ not reaching the issue of whether it actually was improper), and that she engaged in protected activity when she directed the Chief Operating Officer (COO) to turn the unlicensed broker's file over to auditors.

Under the corporate structure, the COO was the Complainant's peer rather than her supervisor. The ALJ found nonetheless that the COO had sufficient authority and involvement in investor relations, auditing and private placement to conclude that she was a person with authority to investigate, discover and terminate misconduct related to securities law under 18 U.S.C. § 1514A(a)(1)(C), and therefore a person to whom disclosures of potential securities law violations are protected.

The ALJ also found that the Complainant's refusal to meet with the unlicensed broker and persons that he was referring to the company also was protected activity. The Complainant had informed the CEO that she did not want to attend the meeting because it was with the unlicensed broker's referrals.

PROTECTED ACTIVITY; THREE COMPONENTS - PURPORTED VIOLATION OF LAW RELATING TO FRAUD AGAINST SHAREHOLDERS - OBJECTIVELY REASONABLE BELIEF IN PURPORTED VIOLATION - COMMUNICATION OF CONCERN; ACTIONS CAUSING LOSSES TO CLIENTS AS PROTECTED ACTIVITY

In ***Hughart v. Raymond James & Associates, Inc.***, 2004-SOX-9 (ALJ Dec. 17, 2004), the ALJ looked at similar case law developed in environmental and nuclear safety whistleblower cases, and determined that a protected activity under SOX has three components:

- the report or action must involve a purported violation of a Federal law or SEC rule or regulation relating to fraud against shareholders.
- the complainant's belief about the purported violation must be objectively reasonable.
- the complainant must communicate his concern to either his employer, the Federal Government or a member of Congress.

In the instant case, the ALJ found that the Complainant engaged in protected activity when aggressively presenting concerns regarding his belief that the Respondent was not taking sufficient steps to protect clients' unclaimed property from being escheated by the state government, was improperly permitting the withholding of foreign taxes from clients' investments funds, and was permitting improper over-the-counter trades of limited partnership shares.

PROTECTED ACTIVITY; PARTICIPATION IN INVESTIGATION OF ACTIVITY REASONABLY PERCEIVED TO BE FRAUD ON SHAREHOLDERS

In ***Hendrix v. American Airlines, Inc.***, 2004-AIR-10, 2004-SOX-23 (ALJ Dec. 9, 2004), the ALJ found that the Complainant engaged in protected activity under the Sarbanes Oxley Act when he participated in the investigation of an employee whom the Complainant reasonably believed was committing fraud against the Respondent and its shareholders by creating art objects for personal gain out of company material, on company time. The Respondent asserted that the Complainant was only a "witness" to a manager's protected activity because it was that other manager who reported the alleged fraudulent activity to upper management. The ALJ, however, found that the Sarbanes Oxley Act protects an employee who provides information *or otherwise assists* in the investigation of fraudulent activity. The ALJ found that although the Complainant never identified a particular code section he believed had been violated, the Sarbanes Oxley Act merely requires that a complainant have a reasonable belief that he is blowing the whistle on fraud and protecting investors.

PROTECTED ACTIVITY; ALLEGED FRAUD ON NASA COULD ALSO BE A FRAUD ON SHAREHOLDERS UNDER THE RIGHT CIRCUMSTANCES -- THEREFORE SUMMARY DECISION NOT APPROPRIATE

In ***Mann v. United Space Alliance, LLC***, 2004-SOX-15 (ALJ Feb. 18, 2005), the ALJ declined to grant summary judgment to the Respondents on the issue of protected activity because the Complainant's allegation of a perpetration of a fraud on NASA by improperly favoring certain vendors in violation of federal acquisition regulations, although less than direct, could also perpetrate a fraud on stockholders under certain circumstances.

PROTECTED ACTIVITY; COMPLAINANT'S REASONABLE BELIEF THAT RESPONDENT WAS ENGAGED IN AN ILLEGAL AND CRIMINAL ACT

In ***Taylor v. Wells Fargo, Texas***, 2004-SOX-43 (ALJ Feb. 14, 2005), the ALJ found that the Complainant was engaged in protected activity under the SOX when she notified the Respondent of her supervisor's practice of backdating letters of credit. The ALJ found that the Complainant met the "threshold standard, demonstrating by a preponderance of the evidence that she reasonably believed that when backdating the letters of credit, Respondent was falsifying a bank document, which she believed would constitute an illegal and criminal act." Slip op. at 11.

PROTECTED ACTIVITY; SEC RULE REQUIRING REPORTING OF LEGAL PROCEEDINGS; MAIL FRAUD; COMPLAINANT'S BELIEF AT THE TIME OF THE ALLEGEDLY PROTECTED COMMUNICATION

In ***Nixon v. Stewart & Stevenson Services, Inc.***, 2005-SOX-1 (ALJ Feb. 16, 2005), the ALJ granted the Respondent's motion for summary decision where the Complainant originally alleged that his cause of action was based on SEC Regulatory S-K item 103, which mandates reporting of material pending legal proceedings, but where the Complainant presented no evidence that there was such a pending legal proceeding or that any governmental legal proceedings were being contemplated. The Complainant argued that the Respondent had a history of illegal environmental, health and safety activities that would eventually lead to legal proceedings, but the ALJ found that, while this may be true in the long run, at the time the Complainant made the communications he asserted were protected under the SOX whistleblower provision, legal proceedings were neither pending nor contemplated by government agencies; the Complainant's belief that such proceedings would soon be contemplated was not the same as a belief that the government actually was contemplating proceedings.

The Complainant, following discovery, amended his complaint to allege that he also reasonably believed that the Respondent was engaged in mail fraud. The ALJ, however, found that mail fraud includes a scheme or artifice to obtain money or property, of which there was no evidence. Moreover, the ALJ found that there was no evidence that the Complainant considered the Respondent's conduct to have constituted mail fraud at the time he made his communication; rather, the first time this assertion was made was following a conference call in which the ALJ had asked if there was any other basis for the complaint beyond the alleged SEC rule.

PROTECTED ACTIVITY; RAISING A CONCERN ABOUT ACCOUNTING OR FINANCES IS NOT, IN ITSELF, PROTECTED ACTIVITY UNDER SOX; MUST RELATE TO FRAUD AGAINST SHAREHOLDERS

In ***Marshall v. Northrup Grumman Synoptics***, 2005-SOX-8 (ALJ June 22, 2005), the ALJ granted the Respondent's motion for summary decision on the ground that the Complainant's raising of concerns that certain accounting practices violated the Respondent's internal and ethics policies did not qualify as protected activity under the SOX whistleblower provision. The Complainant had alleged that certain managers and the Respondent's controller had willfully misclassified labor hours, depreciation and capital expenses. The ALJ, however, found that the Complainant's concerns, even if true, did not demonstrate fraud against shareholders or actual violations of federal law, but only a grievance with internal company policy. The ALJ wrote that "[r]aising a concern about a violation of an ethics policy is not protected activity. The fact that the concerns involved accounting and finances in some way does not automatically mean or imply that fraud or any other illegal conduct took place." Slip op. at 5 (citation omitted).

PROTECTED ACTIVITY; NO REQUIREMENT THAT THE RESPONDENT WAS NOT ALREADY AWARE OF THE INFORMATION PROVIDED BY THE COMPLAINANT

In ***Allen v. Stewart Enterprises, Inc.***, 2004-SOX-60, 61 and 62 (ALJ Feb. 15, 2005), the ALJ rejected the Respondent's contention that to be protected activity, a complainant must provide information that was not already known by the company. The ALJ found no support for such an assertion in the either the SOX or its legislative history.

PROTECTED ACTIVITY; FRAUD AS INCLUDING AN ELEMENT OF INTENT

In ***Allen v. Stewart Enterprises, Inc.***, 2004-SOX-60, 61 and 62 (ALJ Feb. 15, 2005), the ALJ found that SOX conveys protection to whistleblowers who report activity reasonably believed to be fraudulent in nature, and that "a fraudulent activity cannot occur without the presence of intent." Slip op. at 84. The ALJ stated that "[u]nder the subjective and objective standards applied to the Act, Complainants must actually believe Respondent acted fraudulently and that belief must be reasonable 'based on the knowledge available to a reasonable [person].' See Lerbs [v. Buca Di Beppo, 2004-SOX-8 (ALJ June 15, 2004)]." Slip op. at 84-85.

The ALJ found that the Complainants had not engaged in protected activity in reporting a variety of accounted irregularities. For example, he found that one Complainant testified that she did not believe that the Respondent had acted intentionally with respect to incorrect interest calculations resulting from an unintentional mistake within the computing system. Moreover, that ALJ found that the Complainants could not show a reasonable belief that the Respondent was engaged in fraud because the record demonstrated that the Respondent already knew about the problem before the Complainant reported it and was making it a priority to remedy the problem.

PROTECTED ACTIVITY; REPORT OF VIOLATION OF STATE LAW

In ***Allen v. Stewart Enterprises, Inc.***, 2004-SOX-60, 61 and 62 (ALJ Feb. 15, 2005), the ALJ found that a Complainant's concerns about possible violations of state laws that could result in sanctions and revocation of the Respondent's state licenses were not protected activity under the SOX, which only provides protection to employees who report violations of federal laws.

PROTECTED ACTIVITY; MAKING AN INQUIRY ABOUT COMPLIANCE WITH A REGULATION BUT NOT RAISING A CONCERN THAT THE RESPONDENT WAS VIOLATING THE REGULATION

In ***Allen v. Stewart Enterprises, Inc.***, 2004-SOX-60, 61 and 62 (ALJ Feb. 15, 2005), the ALJ found that a Complainant's inquiry into whether the Respondent was taking steps to comply with a securities regulation in regard to prior years' accountings was not protected activity because she did not raise a complaint or concern that the Respondent had violated the law in reference to those prior years. The ALJ also found that even if she had raised such a complaint, it was not protected activity because she would not have harbored a reasonable belief of a violation of a SEC rule; the documents involved were internal working documents not for submission to the SEC; the Complainant testified that she was not aware of any law making the SEC rule applicable to internal working documents and she testified that she did not believe that there had been any intentional violation of the SEC rule.

PROTECTED ACTIVITY; COMPLAINANT'S BELIEF NOT REASONABLE WHEN ALL THE OBJECTIVE EVIDENCE OF RECORD WEIGHED AGAINST SUCH A BELIEF

In ***Barnes v. Raymond James & Associates***, 2004-SOX-58 (ALJ Jan. 10, 2005), the ALJ found that the Complainant could not be found to have had a reasonable belief that her supervisor was engaged in unethical conduct when the only objective evidence of record weighed against such a belief. The Complainant had told a manager that she believed that her supervisor was engaging in improper switches involving mutual funds thereby generating unnecessary fees for his clients. The record, however, contained no evidence of a single improper transaction by the supervisor. The Complainant's own testimony tended to undercut her claim. In addition, managers reviewed the supervisor's accounts following the Complainant's accusation and found no evidence of impropriety, and an annual internal audit conducted only days after the Complainant made the allegation revealed no evidence of any such activity.

PROTECTED ACTIVITY; PROOF OF REASONABLE BELIEF; FACT THAT COMPANY INVESTIGATED IS NOT, BY ITSELF, PROOF THAT THE COMPLAINANT'S BELIEF WAS REASONABLE

In ***Grant v. Dominion East Ohio Gas***, 2004-SOX-63 (ALJ Mar. 10, 2005), the ALJ observed that the mere fact that a company investigates a complaint does not establish that the complainant had a reasonable belief of illegal conduct. Rather, "[i]n this age of high profile corporate scandal, corporate watchdogs, and since the term 'whistleblower' has become routine headline, it is in any company's best

interest to investigate each and every allegation of wrongdoing no matter how insignificant or ludicrous." Slip op. at n.35.

PROTECTED ACTIVITY; REASONABLENESS OF BELIEF; RELEVANCE OF EXPERT TESTIMONY

In ***Grant v. Dominion East Ohio Gas***, 2004-SOX-63 (ALJ Mar. 10, 2005), the Complainant proffered the testimony of a forensic accounting witness as expert testimony. The ALJ permitted the witness to testify and reserved a ruling on whether such testimony would be considered expert.

The ALJ acknowledged that the witness had qualifications that may qualify as expert; however, she noted that expert testimony is only relevant when it will help the trier of fact understand the evidence or determine a fact in issue. In the instant case, the issue was whether the Complainant reasonably believed that the Respondent was violating one of statutes or regulations enumerated in the whistleblower provision of the SOX. The ALJ noted that SOX does not require proof that an actual accounting fraud took place; nor is the standard whether an accounting expert reasonably believes that fraud occurred. Rather the Complainant must show that he had a reasonable belief that accounting fraud had occurred. The ALJ found that the forensic accounting witness' opinion added nothing to the relevant inquiry.

The ALJ noted that there may be circumstances in which the issue of protected activity may be appropriate for expert testimony, but that facts in evidence in the case before her did not lend themselves to a need for an expert to explain the reasonableness of the Complainant's belief.

The ALJ also found that the witness did not have thorough knowledge of the facts of the case, nor was his testimony particularly relevant to the reasonable belief issue before her. Thus, she declined to grant the witness "expert" status under 29 C.F.R. § 18.702, and afforded his testimony little-to-no evidentiary weight.

PROTECTED ACTIVITY; MERELY QUESTIONING OR REQUESTING EXPLANATIONS OF COMPANY PRACTICES IS NOT PROTECTED ACTIVITY; THERE MUST BE A COMMUNICATION REFERENCING FRAUD

In ***Grant v. Dominion East Ohio Gas***, 2004-SOX-63 (ALJ Mar. 10, 2005), the ALJ found that the Complainant had not engaged in protected activity where he had simply voiced discontent and requested explanations about projects, accounting, and software that he did not understand, and never made any reference to fraud or implied that the company had acted intentionally to mislead shareholders or misstate the company's bottom line. The ALJ wrote: "To be sure, an accounting error does not amount to fraud under the Act. And simply raising questions and lodging complaints without any reference to or suspicion about fraud against shareholders is not protected activity." Slip op. at 40 (footnote omitted). The ALJ found that the purpose of the Act does not support a conclusion that any time a complaint "raises a question about the company's accounting programs or procedures, or about anything else regarding the everyday functioning of the company, he would be engaging in protected activity." *Id.* In a footnote, the ALJ explained that fraud is an integral element of a SOX cause of action, and that such fraud includes an element of

intentional deceit that would impact shareholders or investors. *Id*. at n.40, citing *Hopkins v. ATK Tactical Systems*, 2004-SOX-19 (ALJ May 27, 2004). The ALJ also noted that the reported information needs to have a certain degree of specificity to be protected.

The ALJ summarized:

> The limited scope and application of the Sarbanes-Oxley Act does not cover the complaints and allegations lodged by Complainant here. Sarbanes-Oxley is a corporate governance statute designed to ensure ethical and legal corporate practices by providing protection from retaliation or discrimination to employees who report *reasonable* beliefs based in *articulable fact of illegal activity designed to defraud shareholders*. The Act does not protect an employee who simply raises questions about virtually everything with which he disagrees or does not understand. The Act also does not protect an employee who simply assumes a company has retaliated against him because he raised a lot of questions, lodged a lot of complaints, and labels himself a "whistleblower." The Act affords protections only to so-called whistleblowers who blow the whistle about something covered by the Act.43/ Stated another way, an employer's "retaliation" or "discrimination" is only a violation under the Act if it is in response to that employee's reasonable and articulated belief of fraud related to shareholders or a violation of one of the statutes enumerated in the Act. Here, Complainant has provided no evidence satisfying the requirements of the Act in that regard.
>
> _____
> 43/ Quite frankly, there is nothing in the Act that prohibits a company from firing or otherwise retaliating against an employee just because that employee lodged a number of general complaints, or is otherwise a "loose cannon"....

Slip op. at 43-44 (emphasis as in original).

PROTECTED ACTIVITY; COMPLAINANT'S BELIEF IN FRAUDULENT ACTIVITY, EVEN IF REASONABLE, MUST BE COMMUNICATED

In ***Trodden v. Overnite Transportation Co.***, 2004-SOX-64 (ALJ Mar. 29, 2005), the Respondent was a transportation services business; in the industry companies differentiated themselves with good on-time percentages. The ALJ found that the Complainant, a terminal manager, had a realistic belief that the SEC had been provided an inflated on-time percentage which may have led to an inflated stock price. The ALJ also found, however, that there was no evidence that the Complainant had ever told a superior, a member of Congress, or a federal officer that the Respondent was engaging in questionable activities. Thus, the Complainant did not engage in protected activity -- in effect, he never "blew the whistle."

[Editor's note: In the ALJ's findings of fact, he noted that the Complainant had ceased providing inflated on-time delivery statistics for a two-month period; this

cessation, however, was motivated by an attempt to highlight problems at the terminal such as understaffing. The Complainant returned to the practice of reporting inflating statistics after allegedly being harassed and threatened with replacement.]

PROTECTED ACTIVITY; COMPLAINT THAT THE RESPONDENT MADE FINANCIALLY UNSOUND CHOICES IS NOT THE SAME AS A COMPLAINT OF FRAUD AGAINST SHAREHOLDERS

In ***Stojicevic v. Arizona-American Water Co.***, 2004-SOX-73 (ALJ Mar. 24, 2005), the ALJ found that the Complainant did not engage in protected activity under the SOX when he complained to his superiors about poor project decisions. In his pretrial statement, the Complainant stated that the Respondent's considerable end-of-the-year earnings were the result of a failure to make necessary capital investments rather than good business management. The ALJ wrote that "[a]n allegation that Respondent made financially unsound choices ... is quite distinct from an allegation that Respondent engaged in fraud. Regardless of Respondent's 2003 earning statement, Complainant has not offered any proof that Respondent made false statements or misrepresentations to its shareholders and investors regarding its earnings, such that its conduct constituted fraud." Slip op. at 7.

TIMELINESS OF COMPLAINT; EVENT TENDING TO SHOW LINK BETWEEN PROTECTED ACTIVITY AND TERMINATION DID NOT EXTEND FILING PERIOD WHERE IT WAS NOT CREDIBLE TO BELIEVE THAT THE COMPLAINANT DID NOT ALREADY KNOW THAT THERE WAS A LINK

In ***Roulett v. American Capital Access***, 2004-SOX-78 (ALJ Dec. 22, 2004), the Complainant argued that the time period for filing his SOX whistleblower complaint did not commence until the date that the Respondent filed for registration with the SEC, contending that it was not until that event that he realized that he had been terminated as part of a "housecleaning" effort so that the Respondent's IPO would not be jeopardized by employees with familiarity with alleged improper acts. The ALJ found that although the registration may support the Complainant's belief that he was terminated for protected activity he nonetheless had repeatedly advised the Respondent of his belief that certain of its practices were improper, if not illegal, and had not been given a reason for his termination. In view of that, the ALJ found it unreasonable to accept that it was the registration that triggered the Complainant's knowledge of the association between the protected activity and his termination.

PROTECTED ACTIVITY; REASONABLE BELIEF ESTABLISHED WHERE THE COMPLAINANT WAS IN-HOUSE COUNSEL AND HAD DOCUMENTARY EVIDENCE TO BACK-UP ALLEGATIONS OF IMPROPER ACTIVITIES

In ***Kalkunte v. DVI Financial Services, Inc.***, 2004-SOX-56 (ALJ July 18, 2005), the Respondent DVI Financial was in financial trouble and eventually filed for bankruptcy. The ALJ found that the Complainant's allegation that the Respondent's senior management had altered delinquency reports and incorporated those reports into disclosure statements filed to the public was a protected activity as a report of blatant fraud against shareholders. The Complainant also alleged that following default the Respondent improperly commingled funds with a subsidiary. The ALJ

found that this allegation was also protected activity, as commingling of funds was an overt violation of SEC regulations. The ALJ found that the Complainant had a reasonable belief that these were violations. Complainant was in-house counsel, and understood that these activities were potential violations of SOX; in addition, the allegations were not based on mere conjecture, but backed up with documentary evidence.

BURDEN OF PROOF AND PRODUCTION -- PRETEXT

PRETEXT; FACT THAT "SHOP TALK" IS COMMON IN THE WORK PLACE DOES NOT ESTABLISH THAT IT WAS PRETEXT TO DISCIPLINE THE COMPLAINANT FOR SENDING AN E-MAIL CONTAINING VULGAR LANGUAGE TO A CORPORATE OFFICER

In ***Grant v. Dominion East Ohio Gas***, 2004-SOX-63 (ALJ Mar. 10, 2005), the Complainant sent an e-mail containing vulgar language to a corporate officer purportedly to protest an Employee Assistance Program initiative. The Respondent's stated ground for suspending the Complainant was that this e-mail violated company policy about e-mail communications. The Complainant argued that this was a pretext. He presented evidence that "shop talk" was common at the work place and that others who sent vulgar or sexually charged e-mails had not been disciplined. The ALJ recognized (and the Respondent conceded) that "shop talk" was part of the culture at the work place, but distinguished company tolerance for that culture from sending a vulgar and sexually charged e-mail to a corporate officer who was clearly offended by the e-mail. The ALJ found that no evidence was presented that any employee ever used "shop talk" or other inappropriate language around corporate officers. The ALJ observed that the corporate officer initiated a disciplinary action the same afternoon that he received the e-mail and that the disciplinary procedure had been followed precisely. There was no evidence of any events occurring close to the time of disciplinary proceeding suggesting that the charge was conjured up to cover a plan to suspend the Complainant based on protected activity.

BURDEN OF PROOF AND PRODUCTION -- CLEAR AND CONVINCING EVIDENCE STANDARD

CLEAR AND CONVINCING EVIDENCE; SUMMARY DECISION APPROPRIATE WHERE UNDISPUTED PROOF ESTABLISHED THAT THE COMPLAINANT WAS FIRED FOR THE NON-INVIDIOUS REASON OF INSUBORDINATION

In ***Gallagher v. Granada Entertainment USA***, 2004-SOX-74 (ALJ Apr. 1, 2005), the ALJ granted summary decision in favor of the Respondent where, inter alia, it was undisputed that the Complainant had refused to report to a new Senior Vice President following a reorganization resulting from a merger, which the ALJ concluded was "clear and convincing" evidence that the Complainant would have been fired for the non-invidious reason of insubordination. The ALJ wrote: "A trial would simply be fruitless; the only possible outcome on this record is the dismissal of [the Complainant's] claim for protection under the Act." Slip op. at 14.

DAMAGES AND OTHER REMEDIES -- REINSTATEMENT

REINSTATEMENT; RESPONDENT NO LONGER IN BUSINESS

In ***Kalkunte v. DVI Financial Services, Inc.***, 2004-SOX-56 (ALJ July 18, 2005), the ALJ held that reinstatement was not available as a remedy because the Respondent was no longer in business, having gone bankrupt. The ALJ awarded front pay instead.

PRELIMINARY ORDER OF REINSTATEMENT; DISTRICT COURT ENFORCEMENT

In ***Bechtel v. Competitive Technologies, Inc.***, No. Civ.3:05CV629AVC (D.Conn. May 13, 2005) (case below 2005-SOX-33), the Plaintiff employees, joined by the Secretary of Labor, sought enforcement of the Secretary's preliminary order of reinstatement in a SOX whistleblower case. OSHA had found in favor of the employees and ordered reinstatement. The Respondent requested an ALJ hearing and moved for a stay of the reinstatement order, which the ALJ denied. *See* ***Bechtel v. Competitive Technologies, Inc.***, 2005-SOX-33 and 34 (ALJ Mar. 29, 2005). The Respondent nonetheless continued to refuse to comply with the reinstatement order, resulting in the plaintiffs' district court suit for enforcement. The district court rejected the defendant's argument that the district court did not have subject matter jurisdiction, finding that although the agency had not yet issued a final order, the statute explicitly authorized district court jurisdiction to enforce a preliminary order as if it were a final order. The court also rejected the Defendant's argument that the Plaintiffs were not entitled to a preliminary injunction because they had not demonstrated the material elements for such relief. The court held that the SOX "makes clear that the Secretary of Labor and not the court makes the determination of whether an order of reinstatement is appropriate."

Accordingly, the court ordered the Defendant to immediately reinstate the plaintiff employees and to pay them all salary, benefits and other compensation that would have been earned had the Defendant complied with the preliminary order when it was issued.

PRELIMINARY ORDER OF REINSTATEMENT; REGULATORY OPPORTUNITY TO PETITION FOR STAY OF OSHA REINSTATEMENT ORDER IS NOT INCONSISTENT WITH GOVERNING STATUTES

In ***Bechtel v. Competitive Technologies, Inc.***, 2005-SOX-33 and 34 (ALJ Mar. 29, 2005), one Complainant argued that DOL's regulation that allows a party to request a stay of a preliminary order of reinstatement is inconsistent with statutory mandate (SOX referring to AIR21 in regard to remedies). The ALJ found that the Acts were not in conflict with the regulations; that the Acts limit automatic stays of reinstatement orders but do not suggest that a stay is never appropriate; and that agencies act appropriately in prescribing regulations to implement statutory intent as the agency has defined it upon a review of legislative history and underlying policies.

PRELIMINARY ORDER OF REINSTATEMENT; STAY GRANTED ONLY FOR EXTRAORDINARY REASONS; ANALYSIS SIMILAR TO ANALYSIS FOR INJUNCTIVE RELIEF; POSSIBILITY THAT "ECONOMIC REINSTATEMENT" WOULD CONSTITUTE CONSTRUCTIVE COMPLIANCE; SECURITY RISK ASSERTION IS NOT AUTOMATICALLY GROUNDS FOR STAY

In ***Bechtel v. Competitive Technologies, Inc.***, 2005-SOX-33 and 34 (ALJ Mar. 29, 2005), the ALJ found that the statutory mandate of reinstatement dictates that a stay be granted only for extraordinary reasons -- i.e., circumstances similar to those supporting injunctive relief. In the instant case, the ALJ found that there was a reasonable basis to conclude that the Complainant's would be able to establish a prima facie case and that she was not able to conclude that the Respondent would be likely to succeed on the merits. The ALJ also found that the Respondent had not established that reinstatement would cause it irrepable harm or that the harm it would realize would outweigh that experienced by the Complainants or that reinstatement would be contrary to public policy.

The ALJ, however, ruled that "economic reinstatement" would be constructive compliance with a preliminary order for reinstatement.

The ALJ concluded that the assertion that the Complainants were a security risk, proffered after OSHA had ordered reinstatement, was not grounds for an automatic stay but rather a relevant factor in determining whether injunctive relief should be granted.

PRELIMINARY ORDER OF REINSTATEMENT; STAY GRANTED ONLY FOR EXTRAORDINARY REASONS; CLAIM OF IRREPARABLE HARM BASED ON DISPLACEMENT OF SUCCESSOR TO COMPLAINANT'S POSITION

In ***Windhauser v. Trane***, 2005-SOX-17 (ALJ Feb. 11, 2005), the ALJ found that a stay of a preliminary order of reinstatement should be granted only for extraordinary reasons, rejecting the Respondent's argument that language in the legislative history of the analogous whistleblower provision of the Pipeline Safety Act indicates that the standard should be "sufficient grounds." The ALJ rejected the Respondent's irreparable harm argument based on its being forced to terminate the Complainant's replacement, the ALJ observing that the replacement had been appointed to the position the same day that the Respondent filed its reply brief on the instant motion for a stay.

PRELIMINARY ORDER OF REINSTATEMENT; SANCTIONS FOR FAILURE TO REINSTATE

In ***Windhauser v. Trane***, 2005-SOX-17 (ALJ June 1, 2005), the case had been terminated by settlement, but the ALJ imposed a monetary fine on the Respondent for its failure to reinstate the Complainant. The ALJ pointed out that without an administrative sanction for failure to reinstate without a stay having been granted, a Respondent could enjoy a passive stay, at least until District Court enforcement. The ALJ calculated the fine based on double the amount the Complainant would have earned in salary and bonuses from the date of the OSHA order until the date of settlement of the case.

In contrast, in ***Welch v. Cardinal Bankshares Corp.***, 2003-SOX-15 (ALJ Aug. 9, 2005), the ALJ denied a motion seeking an order to show cause why administrative monetary sanctions should not be imposed by the ALJ on the Respondent for its failure to reinstate the Complainant as ordered by the ALJ in his supplemental Decision and Order on damages. The ALJ denied the motion, finding that enforcement of an order of reinstatement must be pursued by instituting a civil action in U.S. District Court filed by the Secretary or the person on whose behalf the reinstatement order was issued. The Complainant cited the above-noted order in ***Windhauser*** as support for the imposition of monetary sanctions, but the ALJ in ***Welch*** found that order to be neither binding nor persuasive authority. Rather, the ALJ found that enforcement in district court was the Complainant's only avenue for relief, citing as an example, *Bechtel v. Competitive Technologies, Inc.*, No. Civ.3:05CV629AVC (D.Conn. May 13, 2005) (case below 2005-SOX-33).

REINSTATEMENT; AFTER ACQUIRED EVIDENCE; SHAREHOLDERS' RE-ELECTION OF BOARD OF DIRECTORS WHO REMOVED COMPLAINANT; HOSTILITY TOWARD COMPLAINANT; DISPLACMENT OF INCUMBENT

Recognizing that reinstatement is a drastic remedy that can pose difficulties, the ALJ in ***Welch v. Cardinal Bankshares Corp.***, 2003-SOX-15 (ALJ Feb. 15, 2005), noted that it is nonetheless part of the "make whole" goal of the SOX and that it is the presumptive remedy in wrongful termination cases. The Respondent presented four grounds for not granting reinstatement in ***Welch***, but the ALJ rejected each.

First, the Respondent asserted that it had learned of facts that made the Complainant (who was the Respondent's CFO) unfit for his position ("after acquired evidence"). Those facts allegedly were egregious errors contained in call reports that were purportedly not learned of by the Board of Directors and the CEO until after the Complainant had been fired. The Respondent argued that the Complainant would have been fired for such errors had he not already been fired. The ALJ, however, found that the record made at the hearing established that the Respondent clearly knew about the call report errors prior to the time he was fired, and therefore could not rely on the errors to invoke the after acquired evidence rule.

Second, the Respondent argued that because the shareholders had re-elected the same Board of Directors who fired the Complainant, it would be egregious to require reinstatement, thereby substituting a tribunal's judgment for the judgment of both the company's independent directors and the shareholders, who are the intended beneficiaries of SOX. The ALJ rejected this argument, observing that the re-election reflected nothing more than the shareholders general approval of the board and not specific approval of dismissal of the Complainant, and that there was no legal authority to support the argument as a factor to consider in regard to reinstatement.

Third, the Respondent argued that its operations were small, and that the Complainant would be required to work in close proximity with persons who had developed a distrust and dislike of him. The ALJ noted that numerous courts have held that friction is typically not a sufficient basis for denying reinstatement. The ALJ found evidence that hostility toward the Complainant existed within Respondent's

workforce and officers, but concluded that SOX nonetheless compelled reinstatement.

Finally, the Respondent argued that it would have to displace the Complainant's replacement, who was uninvolved with the events leading to the Complainant's discharge. The ALJ, however, found that the incumbent was unlikely not to have known that the CFO position was subject to a legal claim by the Complainant given the extensive local and national press coverage that had been given to the case. The ALJ also noted that the Respondent had long known that it would be ordered to reinstate the Complainant (the ALJ had issued his decision on the merits in January 2003) and that the delay in the decision on remedies had been occasioned by the Respondent's decision to attempt to take an interlocutory appeal. Thus, the incumbent's potential hardship if bumped was directly attributable to the Respondent's litigation strategy. The ALJ also discussed the Fourth Circuit's decision in *Spagnuolo v. Whirlpool Corp*., 717 F.2d 114 (4th Cir. 1983), in which the court established a "rightful place" theory where aggrieved employees cannot bump innocent incumbents but are given seniority rights for the next vacancy and back pay to compensate for lost earnings. The ALJ noted that *Spagnuolo* was decided under Title VII and the ADEA, and also distinguished the facts of that case and the facts in *Welch*. Further, the ALJ noted that dicta in *Spagnuolo* supports reinstatement if the employer hired the incumbent in violation of an order requiring reinstatement of the complainant to a comparable position.

DAMAGES AND OTHER REMEDIES -- PUNITIVE DAMAGES

PUNITIVE DAMAGES NOT AVAILABLE UNDER SOX

Punitive damages are not available under the whistleblower provision of the Sarbanes-Oxley Act. ***Hanna v. WCI Communities, Inc.***, No. 04-80595-CIV (S.D. Fla. Dec. 2, 2004).

PUNITIVE DAMAGES NOT AVAILABLE

In ***Murray v. TXU Corp.***, 2005-WL-1356444 (N.D.Tex. June 7, 2005), the district court held that the remedies portion of the SOX whistleblower provision at 18 U.S.C. § 1514A does not provide for punitive damages.

DAMAGES AND OTHER REMEDIES -- LOSS TO REPUTATION

DAMAGES; DAMAGES FOR LOSS TO REPUTATION MAY BE AWARDED

Damages for loss to reputation may be awarded under the “make whole” remedy of the whistleblower provision of the Sarbanes-Oxley Act . ***Hanna v. WCI Communities, Inc.***, No. 04-80595-CIV (S.D. Fla. Dec. 2, 2004).

DAMAGES; DAMAGES FOR LOSS TO REPUTATION MAY NOT BE AWARDED

In ***Murray v. TXU Corp.***, 2005-WL-1356444 (N.D.Tex. June 7, 2005), the district court held that the remedies portion of the SOX whistleblower provision at 18 U.S.C. § 1514A does not provide for reputational injury.

DAMAGES AND OTHER REMEDIES -- SPECIAL DAMAGES

TIMELINESS OF REQUEST FOR SPECIAL DAMAGES; TOO LATE TO REQUEST AFTER THE CLOSE OF THE EVIDENTIARY HEARING

In ***Jayaraj v. Pro-Pharmaceuticals, Inc.***, 2003-SOX-32 (ALJ Feb. 11, 2005), the ALJ granted the Respondent's motion to strike the Complainant's post-hearing request for stock options where the hearing had lasted four days and provided an opportunity to present evidence on all issues, including relief, and there had been no discussion or agreement to delay evidence on relief to a post-trial hearing should the Complainant prevail on the underlying claim.

FRIVOLOUS COMPLAINT; SANCTIONS

FRIVOLOUS CLAIM; ATTORNEY'S FEES; REASONABLE ATTEMPT TO EXPAND BOUNDARIES OF LAW

The Respondent requested attorney's fees pursuant to 29 C.F.R. § 1980.105(b) and 29 C.F.R. § 1980.106(a), which permit an ALJ to award attorney's fees when a complaint is frivolous or brought in bad faith. The Respondent alleged that the Complainant knew that the Employer was not a publicly traded company. The ALJ declined to award fees because the Complainant was proceeding pro se, she had made a non-frivolous complaint under OSHA or environmental protection laws, there was no evidence of bad faith or improper motives, and "[f]inally, given the relative newness of the Act and the limited body of interpretive case law, I find that it was not unreasonable for the Complainant to try to expand the boundaries of the law, which she did most creatively." ***Minkina v. Affiliated Physician's Group***, 2005-SOX-19 (ALJ Feb. 22, 2005).

ATTORNEY FEE SANCTION; A WEAK CASE IS NOT NECESSARY A FRIVOLOUS CASE

In ***Grant v. Dominion East Ohio Gas***, 2004-SOX-63 (ALJ Mar. 10, 2005), the ALJ declined to impose an attorney fee sanction against the Complainant under 29 C.F.R. § 1980.109(b). The ALJ observed that the strength of the case was in serious question, but found that it did not rise to the level of being frivolous. The ALJ noted that the Complainant had consulted an attorney, and that even though he did not have a strong case that he engaged in protected activity as defined by the Act, this did not mean that he did not have a sincere belief that a legitimate claim could be brought.

SETTLEMENTS

SETTLEMENTS IN SOX CASES; PROCEDURE WHERE IT IS UNCLEAR WHETHER A SETTLEMENT UNDERLIES A WITHDRAWAL

In ***Concone v. Capital One Financial Corp.***, ARB No. 05-038, ALJ No. 2005-SOX-6 (ARB Apr. 25, 2005), the ALJ had found in favor of the Respondent. An appeal to the ARB followed. The Complainant's attorney wrote to the ARB stating that "the parties have settled" and will file a "joint stipulation of settlement." Subsequently the parties sent the ARB a "Joint Stipulation of Dismissal" and a proposed Order. The stipulation only stated that the parties "hereby stipulate and agree to dismiss this action, with prejudice, in its entirety, each party to bear its own costs and attorneys' fees." The parties' proposed Order states that the parties submitted a Joint Stipulation of Dismissal" and it appears to the ARB it is 'just and proper to do so' . . . with prejudice . . . " Neither document referred to a settlement.

The ARB, therefore, issued an "Order Requiring Clarification," pointing out that under 29 CFR § 1980.111(c) a case at the ARB can be terminated by (1) before findings or an order becomes final, by withdrawing objections or (2) by settling the case and obtaining ARB approval of the settlement which will be filed with the ARB, per § 1980.111(d)(2). The clarification order noted that the initial letter indicated that there was a settlement between the parties that was not submitted to the ARB. The ARB ordered that the settlement be submitted to it. However, the ARB also stated: "If, instead, Concone intended to withdraw his objections to the findings, then he must so notify the Board in writing."

Subsequently, the parties filed a Joint Motion to Withdraw Joint Stipulation of Dismissal, and the Complainant filed a Notice of Withdrawal of Objections. The ARB, without elaboration, approved the withdrawal of objections and dismissed the appeal. ***Concone v. Capital One Financial Corp.***, ARB No. 05-038, ALJ No. 2005-SOX-6 (ARB May 13, 2005).

VOLUNTARY DISMISSAL/WITHDRAWAL

VOLUNTARY DISMISSAL; "WITHOUT PREJUDICE"

The Complainant filed a Motion for Voluntary Dismissal without prejudice to his right to pursue claims under state law. The ALJ granted the motion. The Respondent expressed a concern that the purpose of the "without prejudice" request is [to] indefinitely suspend implementation of the Assistant Secretary's findings and preliminary order. The ALJ, however, found that within the context of his motion, the Complainant was only seeking to ensure that the dismissal of his objection would not adversely affect his ability to pursue relief under state law. The ALJ, therefore, interpreted the request for dismissal "without prejudice" not to mean that the Complainant seeks an indefinite deferral of the Assistant Secretary's findings and

preliminary order. ***Stavrulakis v. Forest City Enterprises, Inc.***, 2005-SOX-5 (ALJ Jan. 27, 2005).

WITHDRAWAL BEFORE ALJ CONSTITUTES WITHDRAWAL OF HEARING REQUEST RATHER THAN WITHDRAWAL OF CLAIM

Where the Secretary's Findings are not final and a written withdrawal has been filed with the ALJ, approval of the withdrawal is appropriate under 29 C.F.R. § 1980.111(c). Although the Complainant may indicate a desire to withdraw his claim, he is actually withdrawing his hearing request. ***Weed v. Asset Acceptance Corp.***, 2005-SOX-63 (ALJ Aug. 5, 2005).

ATTORNEY REPRESENTATION

DISQUALIFICATION OF COUNSEL; CHOICE OF LAW; CONFLICT OF INTEREST; LAWYERS CALLED AS WITNESSES; MISCONDUCT IN OTHER FORUMS; LACK OF GOOD FAITH IN FILING OF MOTION

In ***Gallagher v. Granada Entertainment USA***, 2004-SOX-74 (ALJ Oct. 19, 2004), the Complainant moved to disqualify the Respondents' trial counsel, as well as that counsel's law firm based on a variety of alleged conflicts of interest, misrepresentations, and violations of state professional responsibility rules. The most prominent charges were that the Complainant had served as the Respondent's in-house counsel supervising matters assigned to the Respondents' law firm as outside counsel, and that he intended to call the Respondent's trial counsel and other lawyers from her firm as trial witnesses.

The ALJ easily disposed of the conflict of interest issue finding the Complainant had not alleged facts showing that he personally was a client of Respondent's law firm. The other grounds asserted for disqualification, however, were more difficult.

The ALJ initially addressed the question of determining the applicable standards, OALJ being an administrative court with nationwide jurisdiction and without DOL regulations adopting a detailed ethics code for lawyers who litigate at OALJ nor a choice of law provision for lawyers who practice before OALJ. The ALJ reviewed relevant statutory, regulatory and decisional law, and concluded that the rules for the federal district court where the matter would be litigated should be applied in a SOX whistleblower case. In the instant case, that court would be the federal district court for the Central District of California, which has by local rule adopted standards of professional conduct which incorporate California law and the ABA Model Rules of Professional Conduct as guides.

In regard to the lawyer as witness issue, the ALJ determined that the California rule distinguishes between cases tried before a jury and those tried before a judge; the California rule does not disqualify a lawyer who testifies before a judge. Moreover, the rule does not apply to lawyers in an advocate's firm.

The Complainant also alleged several instances of purported misconduct by the Respondent's lawyers before OSHA or in other forums. The ALJ held, however, that

"[e]xclusion under 29 C.F.R. § 18.36(b) ought to be limited to instances of ethical misconduct that prejudiced the movant at OALJ, or that cause the lawyer to have been disciplined by another court or agency. * * * A disqualification motion under 29 C.F.R. § 18.36(b) is not an occasion to examine the ethics of selected members of a law firm for actions they took as counsel in other cases, or in ... corporate restructuring."

Finally, the ALJ noted that the motion for disqualification had not been supported by any proof, failed to acknowledge relevant California law despite arguing that California law applied, and cited non-existent ethics rules -- which in concert led the ALJ to conclude that the motion had not been filed in good faith.